153 U.S. 87

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1130.

THE UNITED STATES, APPELLANT,

vs.

ROBERT S. SHIELDS.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 22, 1894.

(15514.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1130.

THE UNITED STATES, APPELLANT,

vs.

ROBERT S. SHIELDS.

APPEAL FROM THE COURT OF CLAIMS

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16880

1 In the Court of Claims.

ROBERT S. SHIELDS
vs.
THE UNITED STATES. } 16823.

I.—*Petition—Filed September* 23, 1890.

To the Honorable Judges of the Court of Claims:

Your petitioner, Robert S. Shields, a citizen of the United States, and a resident of Canton, in the State of Ohio, respectfully shows:

That from the 1st day of July, 1865, to the 31st day of December, 1889, he was a United States district attorney for the northern district of Ohio, duly qualified and acting.

That during said period he performed, as said district attorney,
2 all the services required of him by the laws of the United States in attendance upon the district and circuit courts of the United States and for examinations before commissioners of persons charged with crime.

That he made up his accounts for said services, and charged the fees authorized by section 824 of the Revised Statutes of the United States; that said accounts were duly verified by the oath of your petitioner, and presented to the United States court for its approval, and orders approving said accounts were duly entered of record as being just and in accordance with law.

That said accounts were then presented to the accounting officers of the United States Treasury Department for payment, and they refused to allow the sum of $3,844.60, as per Exhibit A herewith attached and made a part of this petition; and although payment of said amount has been repeatedly demanded, yet no part of the same has been paid to him, nor to any one for him, nor has any part of the same been allowed to him in any way as a credit or set-off by any officer or department of the United States; but, on the contrary, allowance and payment thereof has been refused.

Your petitioner further shows that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof.

Wherefore your petitioner prays judgment against the defendant for $3,844.60.

ROBERT S. SHIELDS.

By his attorney:
CHARLES C. LANCASTER.

3 EXHIBIT A.

United States of America, Dr.

To Robert A. Shields, district attorney of the United States for the northern district of Ohio, for services performed on behalf of the United States, to wit:

Item 1. For traveling from Canton, the place of his abode, to Cleveland and Toledo, the places of holding the United States district and cir-

cuit courts, at 10 cents per mile going, and 10 cents a mile for returning, disallowed, as follows:

Report	93,773	$139.20
"	95,537 (item 4)	374.40
"	96,543	243.60
"	98,532 (items 5 and 8)	38.40
"	99,291 (item 17)	4.20
"	100,769 (item 10)	3.70
"	104,342 (item 10)	4.20
"	105,822 (item 4)	16.80
"	108,937 (item 9)	26.30
"	118,557 (item 9)	11.60
		862.40

Item 2. For traveling from Canton, the place of his abode, to the place of examination before a commissioner of a person charged with crime, at 10 cents per mile for going, and 10 cents per mile for returning, disallowed, as follows:

Report	93,773	$104.40
"	95,537 (item 4)	374.40
"	98,332 (items 4 and 7)	54.80
"	99,291 (items 1 to 16)	123.80
"	100,769 (items 3, 4, 5, 6, 7, 8, 9)	171.50
"	102,643 (items 1, 2, 3)	66.80
"	104,342 (items 5, 6, 7, 8, 9)	29.00
"	105,822 (item 5)	26.80
"	106,741 (items 12, 13, 14, 15)	33.10
"	110,213 (items 5, 6, 7)	90.00
"	116,115 (item 4)	22.60
		1,097.20

4 Item 3. For services in cases where an indictment was tried before a jury and a conviction had, the court allowed a counsel fee not exceeding thirty dollars in each case in addition to the attorney's fee, otherwise provided for by section 824, Rev. Stats., and the following amounts were disallowed, as not approved by the Attorney-General, as follows:

Report	95,537 (item 1)	$45.00
"	104,342 (items 1, 2, 3)	45.00
"	106,741 (item 4)	15.00
"	108,937 (items 5, 6, 7)	60.00
"	110,213 (item 1)	75.00
"	112,607	105.00
"	116,115 (item 1)	100.00
		445.00

Item 4. For examination before a commissioner of persons charged with crime, $5 per day, disallowed, as follows:

Report	95,537 (item 3)	$15.00
"	98,532 (item 3)	5.00
"	100,769 (item 2)	5.00
"	106,741 (item 12)	5.00
"	110,213 (items 3 and 4)	25.00
		55.00

Item 5. For attendance in the court of the United States on the business of the United States, 177 days, at $5 per day, disallowed, as follows:

Report	99,291 (item 18)	$5.00
"	102,643 (items 6 and 6½)	155.00
"	104,342 (item 4)	155.00
"	107,849	420.00
"	108,937 (item 8)	140.00
"	110,213 (item 2)	10.00
		885.00

5 Item 6. For services in various cases tried under indictment, the fees charged were disallowed because one or more cases were not joined in the same indictment, as follows:

Report	105,822 (item 1)	$10.00
"	106,741 (items 1, 2, 3, 5, 6, 7, 8, 9, 10)	135.00
"	108,937 (items 1, 3, 6)	25.00
"	118,557 (items 1 to 8)	330.00
		500.00
	Total amount claimed	3,844.60

DISTRICT OF COLUMBIA:

Before me, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney, duly executed by said petitioner and filed herewith, to verify said petition; that petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me, this 20th day of September, 1890.

[SEAL.] ARTHUR C. CLARKE,
Notary Public.

6 II.—*Traverse—Filed October* 29, 1890.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

7 III.—*Findings of fact as finally amended.*

This case having been heard by the Court of Claims, the court upon the evidence finds the facts to be as follows:

I.

The claimant was United States district attorney for the northern district of Ohio from the first day of July, 1885, to the thirty-first day of December 1889, duly qualified and acting.

II.

During said period he made up his accounts for services and travel on behalf of the United States, duly verified and presented the same to the United States court for approval, and an order was entered of record approving said accounts as being just and according to law. Said accounts were then presented to the accounting officers of the Treasury Department for payment. Part was paid, but they refused payment for the items included in Finding III.

III.

(1) For travelling on the business of the United States at various times from Canton, the place of his abode, to Cleveland and Toledo, the place of holding the United States district and circuit courts, by the nearest traveled route, at 10 cents per mile for going and 10 cents per mile for returning, $450.10.

If the claimant had traveled by the shortest railroad route the amount of his mileage would be $417.00.

8 (2) For travelling on the business of the United States at various times from Canton, the place of his abode, to Cleveland and Toledo, the places of examination before a circuit court commissioner of a person charged with crime, by the nearest usually traveled route, at 10 cents per mile for going and 10 cents per mile for returning, $1,070.40.

If the claimant had travelled by the shortest railroad route the amount of his mileage would be $916.00.

(3) For services in cases where an indictment was tried before a jury and a conviction had the court allowed a counsel fee not exceeding thirty dollars in each case in addition to the attorney's fee otherwise provided for by section 824, Revised Statutes, and the accounting officers disallowed a counsel fee of thirty dollars in one case and a part of the counsel fee in the other cases, upon the recommendation of the Attorney-General, making a total disallowance of $445.00.

(4) For services in criminal causes where two or more indictments were found against the same defendant for distinct offenses of the same class and a separate trial had or a nol. pros. entered, and a separate fee charged in each cause, the accounting officers allowed one fee and disallowed the other fees in causes against the same defendant, on the ground that they should have been consolidated, making a total disallowance of $220.00.

The court did not order the indictments to be consolidated.

9 *Additional findings given on request of defendants.*

Add to paragraph 1 of Finding III, the following:

Of said amount the sum of two hundred and seventy-eight dollars and fifty cents ($278.50) is mileage at ten cents per mile for travel performed by claimant as district attorney during the terms of the United States circuit and district courts in returning on each Saturday during said terms to his home at Canton from Cleveland, the place of holding court, and going each Monday morning following to Cleveland to attend said courts on the business of the United States.

The distance traveled each round trip was 116 miles. The accounting officers allowed and paid claimant eleven dollars and sixty cents mileage for one trip only for each term of court, and they disallowed the above amount as unauthorized by law. The twenty-four round trips disallowed were performed between July 13, 1885, and September 27, 1885, and January 2, 1886, and March 28, 1886. The district attorney made no per diem charges for the intervening Sundays.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the former judgment entered May 8, 1893, be, and the same is hereby, set aside, and a judgment be now entered for the sum of $1,998, one hundred and eighty-seven dollars and fifty cents being disallowed for excess of mileage.

BY THE COURT.

10 IV.—*Judgment of Court.*

At a Court of Claims held in the city of Washington on the 22d day of May, A. D. 1893, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, Robert S. Shields, do have and recover of and from the United States the sum of nineteen hundred and ninety-eight dollars.

BY THE COURT.

On the 25th day of August, 1893, the defendants filed a motion for a new trial, and on the 15th day of January, 1894, said defendants filed their request for additional findings of fact. On the 15th day of January, 1894, the court overruled said motion for a new trial and allowed said request for additional findings of fact, which said findings are incorporated into and form part of the findings of the court, set out in No. III of this record.

11 VII—*Application of defendants for and allowance of appeal.*

ROBERT S. SHIELDS
v.
THE UNITED STATES. } No. 16823.

From the judgment rendered in the above-entitled cause on the 22d day of May, 1893, in favor of the claimant, the defendants, by their Attorney-General, on the 29th day of January, 1894, make application for and give notice of an appeal to the Supreme Court of the United States.

FELIX BRANNIGAN,
Assistant Attorney, acting for the Assistant Attorney-General.

Filed and allowed in open court January 29, 1894.

WILLIAM A. RICHARDSON,
Chief Justice.

12 In the Court of Claims.

ROBERT S. SHIELDS
vs.
THE UNITED STATES. } No. 16823.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court, of the application of the defendants for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 13th day of February, A. D. 1894.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed on cover:) Case No. 15514. Term No. 1130. The United States, appellant, vs. Robert S. Shields. Court of Claims. Filed February 23, 1894.

Office Supreme Court U. S.
FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
v.
ROBERT S. SHIELDS, APPELLEE.
} No. 93.1130.

APPELLANT'S BRIEF.

J. E. DODGE,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
v.
ROBERT S. SHIELDS, APPELLEE.

No. ~~93~~. 1130.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Court of Claims, entered in favor of the appellee, Robert S. Shields, on May 22, 1893, for $1,998, for fees adjudged to be due the appellee as United States attorney for the northern district of Ohio. That allowance, amongst other items, contained certain mileage, a part of which consisted of $278.50 for mileage, at 10 cents per mile, for travel performed as district attorney during the terms of the United States circuit and district courts in returning on each

Saturday during such terms to his home at Canton, from Cleveland, the place of holding court, and going each Monday morning following to Cleveland to attend said courts on the business of the United States, which is the only portion of the amount allowed to which objection will be made, and, therefore, to which is necessary to refer in this statement of facts.

ASSIGNMENT OF ERROR.

The court erred in allowing to the appellee the said sum of $278.50, or any sum, by way of mileage for travel performed in going from the place of holding court to his home on Saturday nights and returning from his home to the place of holding court on Monday morning following during the continuous terms of the United States courts.

ARGUMENT.

At the request of the Treasury Department and as a guide to the accounting officers the Government desires to submit for final determination by this court the single question whether section 823, Revised Statutes, authorizes payment to district attorneys of mileage for their journeys to their homes Saturday nights and returning to court Mondays during the continuous sessions of court in term.

The statute (section 824, Revised Statutes) provides that a district attorney shall receive "for traveling from his place of abode to the place of holding any court of the United States in his district * * * 10 cents a mile for going and 10 cents a mile for returning," and also "for each day of his necessary attendance in a court

of the United States on the business of the United States when the court is held at the place of his abode, $5; and for his attendance when the court is held elsewhere, $5 for each day of the term."

The prior legislation on the subject of compensation to district attorneys consists of chapter 36 of 1792 (1 Stat. L., p. 277), chapter 19 of 1799 (1 Stat. L., p. 625), and chapter 80 of 1853 (10 Stat. L., p. 161).

Chapter 36 of 1792, section 3, provides for same fees as allowed by State laws and "at the rate of 10 cents per mile for his expenses and time in traveling from the place of his abode to either of said courts."

Chapter 19 of 1799, section 4, provides "for each day which any district attorney shall necessarily attend on business of the United States during the session of any district or circuit court, $5, and for traveling from the place of his abode to such court, 10 cents per mile."

Chapter 80 of 1853, section 1, is practically identical on this subject with the Revised Statutes above quoted.

Meanwhile statutes nearly or quite similar in language have provided mileage for marshals, clerks, jurors, and witnesses.

The uniform practice of the Treasury Department has been in case of all these officers and others to allow mileage for but one travel for each term of court.

The allowance of mileage as reimbursement of traveling expenses to court officers and witnesses has existed from very early times, and the practice of limiting such allowances to one trip "to attend court" or "to attend a term of court" doubtless had its origin in the conditions surrounding such attendance in its earlier days.

The historical term of court was very different from that which in modern times bears that designation. It was brief; it knew no interruptions except for *dies non.* It was, indeed, a single legal day and all acts in the same term were considered as done on the same day. (6 Jacobs Law Dict., 1st Am. Ed., 212.)

From the very characteristics of the ancient term of court and the necessities of dispatch of business, and partly from inconvenience attending even short journeys, and time occupied, resulted the practice, first in fact and then in theory, that all litigants, with their attorneys and witnesses, as also all court officers, were in attendance from the commencement to the close of the term.

From these customs naturally and necessarily resulted the understanding that when any person, officer, jury, attorney, litigant, or witness was obliged to attend a term of court he traveled but once from his place of residence to do so, and that an allowance for the expenses of his travel contemplated only the one trip; that "travel to attend court" meant one travel. When formal rules of court or statutes began to be enacted to provide for such expenses they used the expression in the sense it had acquired by custom. (*Pitman* v. *United States*, 45 Fed. Rep'r, 159.)

In Massachusetts early cost statutes allowed the litigant his travel, measured by mileage, and per diem term fees. Under this the court held him entitled to one travel each term. (*Hayward* v. *Ritchie*, 7 Mass., 286.)

The uniform practice in case of witnesses recognized that but one travel was to be paid for each term of court.

These customs, well known to practitioners, have seldom found decision, hardly more than recognition, in opinions of courts of last resort, involving as they usually do only small amounts and seldom, if ever, justifying expenses of reviews by higher courts.

In modern times the convenience of transacting business accompanied by the easy and expeditious means of travel have resulted in the custom of breaking up the stated terms of court into several sessions, each of which has substantially the characteristics of the old "term."

In the light of these customs must be construed the provisions of the fee statutes with reference to earning of mileage. These statutes all have their inception, starting as they do in Congressional legislation of 1792, at times when the ancient term was still customary with the resulting common understanding that an attendant on the court would travel but once each term and the uniform practice of allowing but one travel to attend the term follows as of course.

This practice is itself a weighty consideration in favor of that interpretation of the statute, which is further greatly strengthened in the case of U. S. attorneys by the other provisions of the fee statute passed in 1853, which allowed them a per diem for each day of the term. Such provision could have been enacted only in contemplation of continuous attendance and absence of mileage for repeated journeys to and from the place of holding court. Under it attorneys were allowed per diem fees for legal holidays, Sundays, and other days in term on which courts did not sit. (*United States* v. *Perry*, 50 Fed. Rep., 743.)

The practical construction of the statute since 1792 as allowing only one travel, uncorrected by legislation, and impliedly ratified and adopted by re-enactment in the same terms in 1853, and again by the Revised Statutes in 1873, is too firmly established to be lightly set aside.

The changed conditions under which U. S. attorneys living but short distances from places of holding court returned to their residences frequently—some of them nightly—existed in 1873, but Congress then continued the provisions under which these attorneys had so long been paid for one travel, with per diems for every day in the term.

It is true that subsequent legislation (Act March 3, 1887, 24 Stat. L., p. 541) has now modified the per diem provisions of the Revised Statutes, but the mileage provision has not been changed. It is to be construed and interpreted in the light of the circumstances surrounding it when enacted in 1873, and not in view of those which have since been established.

The words of the statute, "For traveling from the place of his abode to the place of holding any court in his district," can logically have but one of two constructions. They mean either that the attorney shall be paid, according to ancient custom, for one travel for the term or modern session, or that he shall be paid for every mile he *in fact* travels, whether his journeys to and from his home be nightly, weekly, or at any other intervals. The latter construction is subject to such abuse, and so repugnant to the meaning affixed to these words by common consent and uniform usage for nearly a century, that such purpose in Congress is well-nigh impossible of conception.

I do not lose sight of the tendency of courts to recognize the changed customs of their sittings and to give in many cases to the word "term" not its statutory significance of the entire period of time between the first day of one stated term and the commencement of the next, but to extend it to what in modern parlance is called a session, having, however, the characteristics of continuity and brevity which marked the ancient term, and to acknowledge that the purpose and meaning of statutes such as the present are best accomplished by applying them to each session. (*Pitman* v. *United States*, 45 Fed. Rep., 159; *United States* v. *Harmon*, 147 U. S., 268–278.)

This recognition of the modern "session" as best satisfying the idea of the ancient "term" in no wise leads to modification or change as to those interruptions which are ancient as the term itself of which the Sunday is one. As the sittings of court of old were broken by each night just so they were broken by each Sunday, neither serving to interrupt the continuity of the legal day.

Nor can the argument in favor of it being in contemplation of Congress in 1873 that attorneys would return to their homes over Sunday fail of application to the nightly journey as well. The attorney living 25 miles from the court city is as much to be expected to make the journey nightly as he who travels 200 miles can be expected to make it weekly, and we have the absurd result of differing rules for the different individuals.

It is earnestly requested that so far as is consistent with the question here raised the rules governing the mileage allowances may be defined in order that the rights of the

several classes of officers may be rendered certain, and that not only the Supreme Court but the other Federal courts may be relieved from the burden of the multitudinous suits arising from the now existing uncertainty.

Respectfully submitted.

J. E. DODGE,
Assistant Attorney-General, for Appellant.

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Office Supreme Court U. S.
FILED.
MAR 24 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1893.

No. 1130.

THE UNITED STATES, Appellant,

vs.

ROBERT S. SHIELDS, Appellee.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.

IN THE

Supreme Court of the United States.

October Term, 1893.

THE UNITED STATES, *Appellant*,
vs.
ROBERT S. SHIELDS, *Appellee*. } No. 1,130.

Appeal from the Court of Claims.

BRIEF OF APPELLEE.

The only item in controversy by the appellant in this appeal is the sum of $278.50 in paragraph one of Finding III for mileage, at 10 cents per mile, for travel performed by claimant as district attorney during the terms of the United States circuit and district courts in returning on each Saturday during said terms to his home, at Canton from Cleveland, the place of holding court, and going each Monday morning following to Cleveland to attend said courts on the business of the United States. R., pp. 4, 5.

The statute itself disposes of the only error assigned. It reads:

"Section 824. For travelling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning."

This section places no fixed limitation on the discretion of the district attorney for travel from his abode in going to or returning from the place of holding any court of the United States in his district. This discretion being given the district attorney, the question arises, has he exercised it reasonably

and in due course of business? The record shows (p. 5) that his home was fifty-eight miles from Cleveland; that he left his home on Monday morning to attend court at Cleveland and returned on the following Saturday; that he made twenty-four round trips between July 13, 1885, and September 27, 1885, and January 2, 1886, and March 28, 1886. The cost of travel for each round trip was only $11.60. He made no per diem charges for the intervening Sundays. There is no law requiring the district attorney to remain over Sunday or any intervening day during the term when the Court is held at a place not his abode at his own expense. The above section is broad, and leaves the question of travel going to and returning from court to the reasonable discretion of the district attorney. In this case his home was only fifty-eight miles from Cleveland, and in returning home on Saturday and going to court on Monday he did what any lawyer would ordinarily do in his private practice—spend Sunday with his family.

This contention is further strengthened by the decision of this Court in the Harmon case, 147 U. S., 278.

In that case the marshal charged for travel on days when the circuit and district court were held by adjournment over an intervening day, and were not held on consecutive days.

This Court approved the opinion of the circuit court, which said: "By the Rev. Stat., sec. 829, cl. 24, the marshal is to be allowed 'for travelling from his residence to the place of holding court, to attend a term thereof, ten cents a mile for going only.' This allowance is not expressly, or by any reasonable implication, restricted to a single travel at each term, but extends to every time when he may be expected to travel from his home to attend a term of court. If the court sits for any number of days in succession, he should continue in attendance, and is entitled to only one travel. But, if the Court is adjourned over one or more intervening days, he is not obliged to remain at his own expense at the place of holding court, but may return to his home, and charge travel for going anew to attend the term at the day to which it is

adjourned. His right to charge travel for going to each special court or special term is, if possible, still clearer and is scarcely contested."

If the marshal is entitled to travel for going to and returning from court to his home when the Court is adjourned over one or more intervening days, one of which may be Sunday, although the record in that case does not disclose the fact, *a fortiori*, the district attorney is entitled to the same travel, and it is immaterial whether one of the intervening days is Sunday or Thursday. If Sunday was a material fact in this question, this Court would not have decided that the marshal was entitled to travel when the court adjourned over one or more intervening days when those very days might be Sundays.

Since this Court has decided that the marshal is entitled to this travel, it follows, as a legal sequence, that the district attorney is also entitled to the same travel. In the marshal's case the statute says: "For travelling from his residence to the place of holding court *to attend a term thereof, ten cents a mile for going only.*"

In the district attorney's case the statute says: "For travelling from the place of his abode to the place of holding any court of the United States in his district *ten cents a mile for going and ten cents a mile for returning.*" In the marshal's case there is an apparent limitation "to attend a *term thereof* ten cents a mile for *going only.*" But this Court has decided that this statute does not expressly or by any reasonable implication restrict a marshal to a single travel at each term.

In the district attorney's case there is no apparent limitation whatever.

No suggestion is made on behalf of the appellant, that if this travel is legal the amount claimed is unreasonable. The travel has been approved by the circuit court as required by the act of February 22, 1875 (18 Stats., 333), and this Court has decided that "the approval of a commissioner's account by a circuit court of the United States * * * is *prima*

facie evidence of the correctness of the items of that account; and in the absence of clear and unequivocal proof of mistake on the part of the court it should be conclusive."

The appellant has offered no proof of mistake on the part of the court.

U. S. *vs.* Jones, 134 U. S., 488.

Upon the law and the facts it is submitted that this appeal should be dismissed.

U. S. *vs.* Harmon, 147 U. S., 278.

U. S. *vs.* Perry, 50 Fed. Rep., 743.

Item 3 of Finding III was decided on the authority of Waters' case, 133 U. S., 208.

Item 4 of Finding III was decided on the authority of U. S. *vs.* Gaston, 28 Fed. Rep., 848.

CHARLES C. LANCASTER,
Counsel for Appellee.

153 US 93

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1066.

THE UNITED STATES, APPELLANT,

vs.

A. KLINGENBERG.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 24, 1893.

(15,450.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1066.

THE UNITED STATES, APPELLANT,

vs.

A. KLINGENBERG.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Clerk's certificate	39	16

1 United States circuit court for the southern district of New York.

In the matter of the application of the collector of customs at New York, for a review of the decision of the board of general appraisers, as to the rate and amount of duty on certain merchandise imported by A. Klingenberg (Austrian florins), per Bohemia, July 22, 1892, and Rugia, July 25, 1892. 34009 a/18961.

To the honorable the circuit court of the United States for the southern district of New York:

Your petitioner, the collector of customs for the collection district and port of New York, being advised that the Secretary of the Treasury is dissatisfied with the decision made on the 27th day of October, 1892, by the board of general appraisers designated by the Secretary of the Treasury for and on duty at said port pursuant to the act of Congress, approved June 10th, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," reviewing and reversing the decision of your petitioner as to the rate and amount of duty chargeable on certain merchandise, China and glass ware per Bohemia. Entry 119162, invoiced at 2,047 florins, and per Rugia, entry 119888, invoiced at 2,274.55
2 florins from Austria, Hungary imported per vessels named and dates named and entered for consumption by the said A. Klingenberg respectfully makes application to this court and sets forth herein the errors of fact and law complained of, to wit:

The said merchandise was classified and assessed for duty at the appropriate rates under the tariff act of October 1, 1890, on an appraised value of 2,046 and 2,274.55 Austrian florins, respectively, which said florins, according to the proclamation of the Secretary of the Treasury made July 1, 1892, upon the estimation of the directors of the mint, and to section 52 of said act, were estimated at 48.2 cents to the florin, upon which estimation duty was assessed as aforesaid, and the entry thereof was liquidated accordingly.

The said owner and importer being dissatisfied with the decision assessing duty as aforesaid, gave notice within ten days after said liquidation and ascertainment of duty, setting forth the reasons of his objection
3 thereto, claiming that in the reduction of the Austrian florin the collector should have adopted the proclaimed value of the silver florin at 32 cents as expressed in the money of account of the United States.

Whereupon the invoices and all papers and exhibits connected therewith were duly transmitted to the said board of general appraisers, which board proceeding to hear and determine the questions of law and fact involved, reversed the collector's said decision in the premises. The record of their decision to this effect appears in a communication addressed to your petitioner under date of the 27th of October, 1892, which is made part hereof.

And for the errors of law and act in the decision of said board in this regard, herein complained of, your petitioner states:

1. That the said board were in error in holding that the reduction of the currency of the invoice into the money of account of the United

States should have been at 32 cents to the florin, whereas by the estimate of the Director of the Mint and the proclamation of the Secretary of the Treasury made July 1, 1892, in conformity with section 52 of the tariff act of October 1, 1890, it appears that silver is but "the nominal standard, paper the actual standard, the depreciation of which is measured by the gold standard."

2. Also in not holding that the value of the florin of the invoice was 42.8 cents in such money of account on the basis of the gold florin of Austria-Hungary according to the estimate of the Director of the Mint and of the said proclamation; there being no certificate of the United States consular officer attached to said invoice showing depreciation of the currency of the same.

4 3. Also in reversing the decision of the collector of customs and in sustaining the protest of the importers in the premises.

Accordingly your petitioner respectfully prays this court to order the said board of general appraisers to return to the court the record and evidence taken by the said board, together with a certified statement of the facts involved in the case, and of their decision thereon, and thereupon to proceed to review said decision and to determine the questions of law and fact involved in the same.

F. HENDRICKS,
Collector of Customs.

5 At a stated term of the United States circuit court for the southern district of New York, held in the United States court and post-office building in the city of New York, on the 26th day of November, A. D. 1892. Present, Hon. E. Henry Lacombe, circuit judge.

In the matter of the application of the collector of customs at New York for a review of the decision of the board of United States general appraisers as to the rate, etc., of duty on certain merchandise imported by A. Klingenberg, per "Bohemia," July 22, 1882, and "Rugia," July 25, 1892, 34009 a/ 18961.

Upon reading and filing the petition herein and upon motion of Edward Mitchell, United States attorney and attorney for the petitioner, it is ordered that the board of United States general appraisers, sitting at the port of New York, return to this court the record and evidence taken by them in the above matter, together with a certified statement of the facts involved and their decision thereon.

E. HENRY LACOMBE,
Circuit Judge.

6 (Endorsed:) No. 1162. United States circuit court for the southern district of New York. In the matter of the application of the collector of customs at New York for a review of the decision of the general appraisers as to the rate and amount of duty on certain merchandise imported by A. Klingenberg, per "Bohemia," July 22, 1892, &c. Petition and order. Edward Mitchell, United States attorney and attorney for petitioner, post-office building, New York city. To the clerk of the U. S. circuit court for the southern district of N. Y. U. S. circuit court, filed Nov. 26, 1892, John A. Shields, clerk.

7 In the circuit court of the United States for the southern district of New York.

In the matter of the application of the collector of customs at New York, for a review of the decision of the board of U. S. gen'l appraisers as to the rate and amount of duty on certain merchandise imported by A. Klingenberg, per Bohemia, July 22, 1892, per Rugia, July 25, 1892. Suit No. 1162. Return of the board of United States general appraisers to the order of Hon. E. Henry Lacombe, circuit judge. Dated New York, December 24th, 1892.

The board of United States general appraisers, sitting at New York, in response to the order of the court in the above matter make the following return of the record and evidence taken by them in the above matter and of the facts involved therein, as ascertained by them.

They state that on the 20th day of September, 1892, a letter dated September 20th, 1892, which is hereto annexed and marked "Exhibit A," was received from the collector of customs at New York, submitting under the provisions of sec. 14 of the act of June 10, 1890, the protest described and marked as follows: "Exhibit B."

Collector's No.	Board No.	Protester.	Vessel.	Date of entry.
18961	34009*/	A. Klingenberg	Bohemia Rugia	July 23/92 " 26/92

8 EXHIBIT A.

OFFICE OF THE COLLECTOR OF CUSTOMS,
Port of New York, Sept. 20th, '92.

Hon. BOARD OF U. S. GENERAL APPRAISERS,
Port of New York:

GENTLEMEN: I submit the protests of the parties named in the annexed schedule from the assessment of duty as made by this office on certain mdse. imported by them in the vessels named in the protests, the importers claiming that duty has been assessed on the mdse. based upon an alleged erroneous valuation of the Austrian florins. I have to state that in absence of a currency certificate of depreciation by the U. S. consul, the florins were taken in the liquidation of the respective entries at 48 2/10 cents each, in accordance with Dept's. instructions of Aug. 3, '92. The importers have complied with the requirements of section 14 of the act of June 10, '90.

Very respectfully,

J. J. COUCH,
Special Deputy Collector.

9 EXHIBIT B.

NEW YORK, *Aug.* 23, 1892.

Hon. FRANCIS HENDRICKS,
Collector of Customs, New York:

SIR: We hereby protest against your decision, liquidation, and assessment of duties as made by you on our importations below mentioned,

consisting of certain china contained in the cases or packages marked and numbered as described on the entries and invoices thereof, to which, for more certainty of description, reference is hereby had, claiming that in estimating the value of the Austrian florin, the currency in which said invoices are made out, you should adopt the value of the standard currency of Austria, viz, the silver florin as last proclaimed by the Secretary of the Treasury or the actual value of the Austrian paper florin. We contend that you have no right to adopt the proclaimed value of the gold florin in estimating duties, because this merchandise was not purchased in gold florins, the invoice is not expressed in gold florins, and gold is not the standard currency in Austria and not at or as charged by you; and we give notice that we pay all other higher rates than is claimed above as the legal rate under compulsion, and to obtain possession of our goods. We claim that the duty exacted by you is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty.

Vessel.	From	Date of entry.	Entry No.	If warehouse, W. H. bond.	Date of liquidation.	Marks and Nos.
		1892.			1892.	
Bohemia	Ham'b'g..	July 22	119162	C	Aug. 19	G. L. H. 14205, &c.
Rugia	"	" 25	119888	C	" 17	A 129 K &c. 1740 1/2 &c., and others, as per invoices and entries.

34009. Decided Oct. 23, 1892.

A. KLINGENBERG.
CURIE, SMITH & MACKIE,
Attorneys, 44 & 46 Exchange Place, N. Y.

To the Board of General Appraisers:

We hereby give notice that we are prepared to substantiate by proof every allegation of fact contained in the within protest, and claim the right to a reasonable notice from your Board of the time and place when an opportunity will be afforded us to furnish such proof.

CURIE, SMITH & MACKIE,
Attorneys for Importer.

10 (Indorsed:) 34009. 18961. A. Klingenberg, Bohemia and 1. (China) currency. Custom-house, New York, Aug. 23, 1892, received. 19930 Po.

Vessel.	Entry.	Liq'ed.	Protested.
	1892.	1892.	1892.
• Bohemia	July 23	Aug. 19	Aug. 23
• Rugia	" 26	" 17	" "

11 There is also hereto annexed the testimony taken before the Board in the matter of the protest of R. F. Downing & Co.,

32695*, which was heard and considered by the Board at the same hearing with the protest and others involving the same question; the said testimony having been taken as well in this case as in the others. The said testimony is marked Exhibit C.

EXHIBIT C.

Before the Board of U. S. General Appraisers, Board No. 1.

In the matter of the protest of R. F. Downing & Co., #32695–A.

NEW YORK, *October* 14*th*, 1892.

[Special hearing. James A. Russell, stenographer.]

LEOPOLD ZIMMERMAN, called as a witness and being first duly sworn, testifies as follows:

By Mr. BROOKS:

Q. What is your business?
A. Banker and broker.
Q. With what firm are you connected?
A. Zimmerman and Forshay.
Q. How long have you been engaged in that business?
A. About 27 years.
Q. Please state to the Board what branches of the banking business you are connected with.
A. We are dealing in foreign exchange and general banking business, as well as stock brokers.
12 Q. You have occasion to have transactions in exchange with Austria?
A. Very frequently.
Q. Did you have such transactions during the month of July past?
A. Yes, sir.
Q. Can you recall any particular transaction that you had during the month of July last?
A. We had several occasions where we remitted pounds sterling to Austria and they converted the pounds sterling into florins, and also have sent Austrian florins, silver and paper money to Austria.
Q. On the occasion when you remitted pounds sterling to be placed to your credit in Austria in florins can you give the amount realized for the sterling in florins?
A. They remitted us in the neighborhood of 119 florins for 10 pounds.
Q. Now, please state to the Board at about what that would amount to in American currency per florin?
A. That is in the neighborhood of 40 3/4 of a cent, sometimes 1/16 less and sometimes 1/16 higher, according to the variation of pounds sterling in that country.
Q. From your transactions in Austria during the month of July, are you able to state to the Board whether that quotation you have just given would answer for, say, the first two weeks in July, or would it vary much?
A. It would not vary very much; it was stationary.

Q. What would be the extent of the variation during, say, the first three weeks of July?

A. I don't believe that the variation would amount to more than 1/16 of one per cent.

13 Q. Have you had occasion during your business to deal in the Austrian gold coins?

A. Yes.

Q. Which coins were they; what size?

A. They are equal to about four dollars in our money.

Q. What were the denominations?

A. 8-florin pieces.

Q. Are there many transactions in those?

A. No; there are not many.

Q. But you have had occasion to handle them?

A. Yes, sir; them come occasionally with 20-franc pieces when people travel and come from the other side; they circulate about the same as a 20-franc piece.

Q. But they are in circulation over there?

A. Yes, sir.

Q. And were they, to the best of your knowledge, in July last?

A. Oh, yes.

Q. Are there silver coins in circulation there, too?

A. Oh, yes.

Q. Is there circulation extended or limited?

A. Limited.

Q. From your knowledge of the subject please state to the Board in what currency the principal part of the business is done in Austria; in Austria in paper florins?

By Judge SOMERVILLE:

Q. Is there any difference in valuation between a paper florin in Austria and a coin florin?

A. They are of equal value; there is no difference.

By Mr. BROOKS:

Q. Can you give the Board the meaning of the words "Oesterreichise Waehrung," which appear on the invoice attached to protest number 34016–A?

14 A. There is various gulden; there is the Holland gulden, and there used to be the German gulden; in order to make a distinction they call this to specify particularly Austrian value.

Q. Is the Board to understand that this phrase means Austrian currency?

A. Austrian value.

(Endorsed:) That on the 28th day of October, '92, the Board of General Appraisers rendered its decision in the matter of said protest No. 34009[s], a copy of which is hereto annexed, marked Exhibit D. And there is also hereto annexed a copy of the decision of the Board (G. A. 1797) upon the said protest of R. F. Downing & Co., No. 32695 A, referred to in the decision of this case and marked Exhibit E.

N. P.

EXHIBIT D.

Before the U. S. General Appraisers at New York, October 28, 1892.

In the matter of the protest 34002-A, &c., of Joel J. Bailey & Co. *et al.*, against the decision of the collector of customs at New York, as to the rate and amount of duties chargeable on certain merchandise-silver florin, standard coin of Austria, imported per the vessels and on the dates named in annexed schedule.

OPINION BY SHARRETTS, G. A.

We find the facts in these cases to be substantially the same as
15 those found by us in the case of R. F. Downing & Co., protest No. 32695 A. Following the ruling of the Board in that case, we hold the collector should have taken the value of the Austrian florin at $0.32, as claimed by the appellants, in accordance with the estimate made by the Director of the Mint and proclaimed by the Secretary of the Treasury July 1, 1892.

The protests are accordingly sustained.

H. M. SOMERVILLE,
CHARLES H. HAM,
THAD. S. SHARRETTS,
Board of U. S. General Appraisers.

59 enclosures.
Invoice and entries returned herewith.
Protests rec'd with collector's letter of Sept. 20, 1892. R.

EXHIBIT E.

(G. A. 1797.)

Depreciated currency—Austrian paper florin not.

Before the U. S. General Appraisers at New York, October 27, 1892.

In the matter of the protest 32695a–18515 of R. F. Downing & Co., against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain merchandise (Austrian florin not a depreciated currency), imported per Darmstadt, July 23, 1892.

OPINION BY SHARRETTS, GENERAL APPRAISER.

We find the following facts in this case:

(1) That certain merchandise was shipped by rail from Tyssa,
16 Austria, June 27, 1892. The invoice covering the merchandise was consulated at Prague, Bohemia, July 5, 1892, and the shipment of the goods by vessel to the United States was made from Bremen, Germany, on or about July 8, 1892.

(2) The merchandise was entered for consumption at the port of New York July 23, 1892.

(3) The invoice value of the merchandise was given in paper florins of Austria-Hungary.

(4) The Director of the Mint estimated, and the Secretary of the Treasury proclaimed, on the 1st of July, 1892, the value of the standard coin of Austria-Hungary, the silver florin, expressed in the money of account of the United States, to be 32 cents. The proclamation of the Secretary of the Treasury of July 1, 1892, contains the additional information that the value of gold florin (not the standard coin) is $0.482, and also that silver is the nominal standard; paper is the actual standard, the depreciation of which is measured by the gold standard.

(5) The value of the paper florin is equal to, or greater than, the value of the silver florin, the standard coin of Austria-Hungary, and that the merchandise in question was not purchased in a depreciated currency.

The facts found do not, in our opinion, justify us in deciding this case contrary to the ruling of his honor Judge Lacombe, in the Hecht case. Section 52 of the act of October 1, 1890, provides that the value of the standard coins in circulation of the various nations of the world
17 shall be estimated quarterly, etc. The standard coin of Austria-Hungary, as proclaimed by the Director of the Mint and Secretary of the Treasury, is the silver florin, in respect to which the paper florin is not a depreciated currency.

The appellants contend that the merchandise was shipped prior to July 1, 1892. This point, in the opinion of the Board, is not a material one, as we have already decided that the statute of liquidation is of the date of entry and not of shipment.

We sustain the protest, and authorize the reliquidation of the entry in accordance with the claim of the appellants therein.

H. M. SOMERVILLE,
CHARLES H. HAM,
THAD. S. SHARRETTS,
Board of U. S. Gen'l Appraisers.

34009.....	A. Klingenberg.....	Bohemia.....	July 23, 1892.
18961.....		Rugia.....	July 26, 1892.
*	*	* *	* * *

And for a certified statement of the facts involved in said matter, as ascertained by them, the said Board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said Board than such as are shown by said decision and other exhibits hereto attached.

18

H. M. SOMERVILLE,
CHARLES H. HAM,
THAD. S. SHARRETTS,
Board of U. S. General Appraisers.

(Endorsed:) No. 1162. U. S. circuit court, southern district of New York. In the matter of the application of the collector for a review of the decision of the Board of U. S. Gen'l Appraisers as to the duty on mdse. imported by A. Klingenberg. Return of record, evidence and facts by Board of U. S. General Appraisers. U. S. circuit court. Filed Dec. 27, 1892. John A. Shields, clerk.

19 United States circuit court, southern district of New York.

In the matter of the application of the collector of customs, at New York, for a review of the decision of the Board of United States General Appraisers as to the rate, etc., of duty on certain merchandise imported by A. Klingenberg, per Bohemia, July 22, 1892, and Rugia, July 25, 1892, 34009 a/ 18961.

SIR: Please take notice that on the petition and order heretofore filed on behalf of the collector and appellant herein on the 26th day of November, 1892, copies of which are hereto annexed, and on the return of the Board of General Appraisers filed with the clerk of this court, we shall move this court at a stated term thereof, to be held at the U. S. post-office and court-house building in the city of New York, on Friday, the 28th day of April, 1893, at 11 a. m., or as soon thereafter as counsel can be heard, for final judgment or decree dismissing the appeal of said collector from the decision of the Board of General Appraisers herein, on the ground that this court has no jurisdiction to entertain or
20 decide such appeal, and for such other and further relief as may be just and proper.

Dated, New York, April 21st, 1893.

Yours, etc.,

CURIE, SMITH & MACKIE,
Attorneys for Importers.

To EDWARD MITCHELL, Esq.,
United States Attorney, Attorney for Collector, Appellant:

(Endorsed:) No. 1162. United States circuit court, southern district of New York. In the matter of the application of the collector of customs at New York for a review of the decision of the Board of United States General Appraisers, as to the rate, etc., of duty on certain merchandise imported by A. Klingenberg, per Bohemia, July 22, 1892, and Rugia, July 25, 1892, 34009 a/ 18961. Notice of motion. Curie, Smith & Mackie, attys. for importers, #46 Exchange Place, N. Y. City—service of copies of the within papers is this day admitted, dated New York, April 22, 1893, Edward Mitchell, U. S atty. and atty. for collector. Motion granted. The case seems to be within the principle of Passavant *v.* U. S. 13 Sup. Ct. Reporter 572, E. H. Lacombe.

21 United States circuit court, southern district of New York.

In the matter of the application of the collector of customs at New York, for a review of the decision of the Board of United States General Appraisers, as to the rate, etc., of duty on certain merchandise imported by Alexander Klingenberg, per Bohemia, July 22, 1892, and Rugia, July 25, 1892, 34009 a/ 18961. No. 1162.

Upon the stipulation of both parties in this case the court finds the following to be the facts involved in this case:

The above-named Alexander Klingenberg imported from Austria-Hungary into the United States at the port of New York certain merchandise by the Bohemia and by the Rugia.

The merchandise imported by the Bohemia was shipped from various places in Bohemia; the invoice covering this merchandise was consulated at Prague, Bohemia, July 6th, 1892; the shipment of this merchandise by vessel to the United States was made from Hamburg, Germany, July 7th, 1892; and this merchandise was entered for consumption at the port of New York, July 23rd, 1892.

The merchandise imported by the Rugia was also shipped from
22 various places in Bohemia; the invoice covering this merchandise was consulated at Prague, Bohemia, July 9, 1892; the shipment of this merchandise by vessel to the United States was made from Hamburg, Germany, July 10, 1892; and this merchandise was entered for consumption at the port of New York, July 26, 1892.

The invoices of the merchandise of both these importations set out its value in paper florins of Austria-Hungary.

The collector of customs at the port of New York, the local appraiser having returned the invoice (and entered) amounts of these paper florins as the value in such florins of this merchandise, thereafter converted these amounts of paper florins into United States money of account at the rate of $0.482 per paper florin, and on the amount of such money of account so obtained as the dutiable values of this merchandise, exacted duties of the importer according to the classifications and at the rates provided by law.

Against the exaction of duties on any amount of such money of account in excess of the amount thereof to be obtained by converting into such money the aforesaid amounts of these paper florins at the rate of $0.32, the importer duly protested, claiming that in estimating the value of the Austrian florin, the currency in which the invoices of this merchandise were made out, the collector should have adopted the value of the standard currency of Austria, viz, the silver florin as last (July 1, 1892, S.
23 13003) proclaimed by the Secretary of the Treasury ($0.32) or the actual value of the Austrian paper florin, and that the collector had no right to adopt the (then) proclaimed value of the gold florin ($0.482) in estimating duties, because this merchandise was not purchased in gold florins, the invoices thereof were not expressed in gold florins, and gold was not the standard currency in Austria-Hungary.

Upon the receipt of this protest the collector, pursuant to section 14 of the customs administrative act of June 10, 1890 (26 U. S. Stat., 137), transmitted the invoices of this merchandise and all the papers and exhibits connected therewith to a board of three U. S. General Appraisers on duty at that port.

The Board of General Appraisers upon the case thus submitted and upon evidence taken by it found among other facts:

(1) That the invoice value of this merchandise was given in paper florins of Austria-Hungary.

(2) That the Director of the Mint estimated, and the Secretary of the Treasury proclaimed on the 1st of July, 1892 (S. 13003), the value of the standard coin of Austria-Hungary, the silver florin, expressed in the money of account of the United States, to be 32 cents; and that the Secretary's proclamation of that date contained the additional information that the value of the gold florin (not the standard coin) was $0.482; that silver was the nominal standard, and that paper was the actual standard, the depreciation of which was measured by the gold standard.

24 (3) That the value of the paper florin was equal to or greater than the value of the silver florin, the standard coin of Austria-Hungary, and that this merchandise was not purchased in a depreciated currency.

(4) That section 52 of the aforesaid tariff act provides that the value of the standard coins in circulation of the various nations of the world shall be estimated quarterly, etc.; and that the standard coin of Austria-Hungary, as proclaimed by the Director of the Mint and by the Secretary of the Treasury July 1st, 1892 (S. 13003), was the silver florin, in respect to which the paper florin was not a depreciated currency.

Upon the foregoing facts the Board of General Appraisers sustained the protest of the importers and authorized the reliquidation of the entries of this merchandise in accordance with the claim made therein, that the value of the paper florins in which the merchandise was invoiced should have been taken to be $0.32 per florin. Under such reliquidation both the classification of this merchandise would be the same as that made and the rate of duty leviable thereon would be the same as that levied by the collector.

Dated, New York, October 23rd, 1893.

E. H. LACOMBE,
Circuit Judge.

25 It is hereby stipulated that the foregoing is a correct and true statement of the facts in the above-entitled case.

EDWARD MITCHELL,
U. S. Attorney, Attorney for Petitioner, Appellant.
CURIE, SMITH & MACKIE,
Attorneys for Importer, Appellee.

(Endorsed:)—No. 1162. United States circuit court southern district of New York. In the matter of the application of the collector of customs at New York for a review of the decision of the Board of United States General Appraisers as to the rate, etc., of duty on certain merchandise imported by Alexander Klingenberg, per Bohemia, July 22, 1892, and Rugia, July 25, 1892, 34009 a/18961. 1162. Agreed statement of facts. Curie, Smith & Mackie, attys. for importer, # 46 Exchange Place, N. Y. City. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

26 At a stated term of the United States circuit court for the southern district of New York, held at the United States circuit court-rooms, in the post-office building, in the city of New York, on the 23rd day of October, 1893. Present, the Hon. E. Henry Lacombe, circuit judge.

In the matter of the application of the collector of customs at New York for a review of the decision of the Board of United States General Appraisers as to the rate, etc., of duty on certain merchandise imported by Alexander Klingenberg, per Bohemia, July 22, 1892, and Rugia, July 25, 1892, 34009 a/18961. No. 1162.

A petition having been filed in the office of the clerk of this court on the 26th day of November, 1892, praying for a review by this court of a decision by the Board of General Appraisers rendered on the 27th day of

October, 1892, as to the amount of duty chargeable upon certain merchandise imported by Alexander Klingenberg, per Bohemia, July 22nd, 1892, and Rugia, July 25th, 1892; and an order having been made and entered on the same day requiring said Board of General Appraisers to return to said court the record and evidence taken by them in said matter, together with a certified statement of the facts involved and their decision
27 thereon, and said Board of General Appraisers having on the day of Dec. 27th, 1892, filed their return in pursuance of said order, and the plaintiff herein having duly noticed a motion based upon said petition, order, and return for final judgment, dismissing said appeal on the ground that under section 15 of the act of June 10th, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," this court has no jurisdiction to entertain or decide said appeal, and said motion coming on to be heard and due deliberation having been had.

After hearing W. Wickham Smith, of counsel for said plaintiff, in support of said motion, and Thomas Greenwood, assistant U. S. attorney, in opposition thereto, on motion of Curie, Smith & Mackie, attorneys for plaintiff,

It is ordered, adjudged, and decreed that said motion be, and the same is hereby granted, and that said appeal be and the same is hereby finally dismissed, on the ground that this court has no jurisdiction to entertain or decide said appeal.

E. H. LACOMBE,
Circuit Judge.

Form approved.

EDWARD MITCHELL,
U. S. Atty. and Atty. for Collector, I. G.

(Endorsed:) No. 1162. United States circuit court, southern district of New York. In the matter of the application of the collector of customs at New York for a review of the decision of the Board of United States General Appraisers as to the rate, etc., of duty on certain merchandise imported by Alexander Klingenberg, per Bohemia, July 22, 1892, and Rugia, July 25, 1892, 34009a/18961. Final judgment.
28 Curie, Smith & Mackie, attorneys for importer. #46 Exchange Place, N. Y. City. U. S. circuit court. Filed Oct. 23, 1893, John A. Shields, clerk.

29 Circuit court of the United States, southern district of New York.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
A. KLINGENBERG, IMPORTER OF CERTAIN MERCHANDISE per Bohemia July 22, 1892, and Rugia July 26, 1892, appellee. } No. 1162.

Upon the foregoing petition, and upon the motion of the above-named importer to dismiss the same for want of jurisdiction, the question arose as to the jurisdiction of the court to hear and determine upon the evidence to be adduced in support thereof these allegations of said petition, to wit:

That the Board of General Appraisers erred:

1. In holding that the reduction of the currency (florins) of the invoice into the money of account of the United States should have been at

thirty-two cents to the florin, whereas by the estimate of the Director of the Mint and the proclamation of the Secretary of the Treasury made July 1, 1892, in conformity with section 52 of the tariff act of October 1, 1890, it appears that silver is "the nominal standard, paper the actual standard, the depreciation of which is measured by the gold standard."

2. Also in not holding that the value of the florin of the invoice was 42.8 cents in such money of account on the basis of the gold florin of Austria-Hungary, according to the estimate of the Director of the Mint and of the said proclamation, there being no certificate of the United States consular officer attached to said invoice showing depreciation of the currency of the same.

3. Also in reversing the decision of the collector of customs and in sustaining the protest of the importer in the premises.

The circuit court granted the motion to dismiss and determined, upon the question presented, that it had no jurisdiction to enter upon, hear, and decide the issues sought to be raised by the aforesaid allegation of said petition, and now certifies this jurisdictional question to the Supreme Court of the United States, under the 5th section of the act of March 3, 1891, chapter 517, 26 U. S. Stat, 827.

E. H. LACOMBE.

Dated New York, October 23, 1893.

(Endorsed:) No. 1162. U. S. circuit court, southern district of New York. The United States of America, appellants, *vs.* A. Klingenberg, importer, &c., appellee. Certificate. Richard Olney, Atttorney-General, per Edward Mitchell, United States attorney, on behalf of the United States. Due service of a copy of the within is hereby admitted. New York, October 23, 1893. Curie, Smith & Mackie, attorneys for appellee. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

Circuit court of the United States, southern district of New York.

THE UNITED STATES OF AMERICA, APPELLANT, *vs.* A. KLINGENBERG, IMPORTER OF CERTAIN MERchandise per Bohemia, July 22, 1892, and Rugia, July 25, 1892, appellee.	No. 1162.

Assignment of errors.

The above-named appellants, the United States of America, assign for error:

1. The dismissal of their petition and suit.

2. The ruling that the said circuit court had no jurisdiction in the premises and over the matters presented to it, as stated in the certificate of the court.

RICHARD OLNEY,
Attorney-General of the United States,
Per EDWARD MITCHELL,
U. S. Attorney, Southern District of New York,
in behalf of the United States.

(Endorsed:) No. 1162. U. S. circuit court, southern district of New York. The United States of America, appellants, vs. A. Klingenberg, importer, &c., appellee. Assignment of errors. Richard Olney, Attorney-General, Edward Mitchell, United States attorney, on behalf of the United States. Due service of a copy of the within is hereby admitted. New York October 23rd, 1893. Curie, Smith & Mackie, at-
32 torneys for appellee. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

33 Circuit Court of the United States, southern district of New York.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
A. KLINGENBERG, IMPORTER OF CERTAIN MERCHANDISE per Bohemia, July 22, 1892, and Rugia, July 25, 1892, appellee. } No. 1162.

SIRS: Please take notice that appeal is hereby taken on behalf of the United States from the decision of this court rendered herein on the 23rd day of October, 1893, to the Supreme Court of the United States.

Dated New York, October 23rd, 1893.

Yours, &c.,

RICHARD OLNEY,
Attorney-General of the United States,
Per EDWARD MITCHELL,
U. S. Attorney, Southern District of New York,
in behalf of the United States.

To CURIE, SMITH & MACKIE, Esqs.,
Attorneys for the above named importer:

(Endorsed:) No. 1162. U. S. Circuit court, southern district of New York. The United States of America, appellant, *vs.* A. Klingenberg, importer, &c., appellee. Notice of appeal. Richard Olney, Attorney-General, per Edward Mitchell, United States attorney, on behalf of the United States. Due service of a copy of the within is hereby admitted. New York, Oct. 23, 1893. Curie, Smith & Mackie, attorneys for appellee. U. S. Circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

34 Circuit court of the United States southern district of New York.

THE UNITED STATES OF AMERICA, APPELLANTS,
vs.
A. KLINGENBERG, IMPORTER OF CERTAIN merchandise per "Bohemia" July 22, 1892, and "Rugia" July 25, 1892, appellee. } No. 1162.

To the honorable the Supreme Court of the United States:

The appeal of the United States, the above-named appellants, by the Attorney-General of the United States, respectfully showeth:

That on the 26th day of November, 1892, a petition and application was made by the collector of customs at New York to the circuit court of

the United States for the southern district of New York for a review of the questions of law and fact involved in the decision of the board of General Appraisers in respect to the value of the florin, in which the importations by the above-names vessels were invoiced.

That on the 23d day of July, 1893, a final decree was made and announced dismissing the aforesaid petition and application.

Wherefore, the Attorney-General of the United States hereby
35 applies, on behalf of the United States, for the allowance of an appeal to the Supreme Court of the United States from the said decision or judgment of the said circuit court of the United States dismissing the said petition and application, and respectfully prays that the said circuit court may certify to the said Supreme Court of the United States without delay the question of the jurisdiction of the said circuit court, and that the said Supreme Court will proceed to hear the said matter so certified and that the said decree of the said circuit court may be reversed.

Dated New York, October 23rd, 1893.

RICHARD OLNEY,
Attorney-General of the United States,
Per EDWARD MITCHELL,
U. S. Attorney, Southern District of New York,
In behalf of the United States.

The foregoing application is granted and appeal allowed.
Dated New York, October 23, 1893.

E. H. LACOMBE,
Circuit Judge.

(Endorsed:) No. 1162. U. S. circuit court, southern district of New York. The United States of America, appellants, vs. A. Klingenberg, importer, &c., appellee. Appeal. Richard Olney, Attorney-General, per Edward Mitchell, United States attorney, on behalf of the United States. Due service of a copy of the within is hereby admitted. New York, October 23, 1893. Curie, Smith & Mackie, attorneys for appellee. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

36 Circuit court of the United States for the southern district of New York.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
A. KLINGENBERG, APPELLEE.

It is hereby stipulated by and between the attorneys for the respective parties in the above-entitled case that the foregoing papers shall constitute the record on appeal to the United States Supreme Court.

RICHARD OLNEY,
Attorney-General of the United States,
Per EDWARD MITCHELL,
U. S. Attorney, Southern District of New York,
In behalf of the United States, Appellants.
CURIE, SMITH & MACKIE,
For Appellee.

37 UNITED STATES OF AMERICA, *ss:*

To A. KLINGENBERG, *Importer:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 20th day of November, 1893, pursuant to an appeal on the part of the United States, filed in the clerk's office of the circuit court of the United States for the southern district of New York, in a certains suit or proceeding entitled The United States of America, appellants, vs. A. Klingenberg, importer, &c., appellee, to show cause, if any there be, why the decision and judgment in the said appeal mentioned should not be reversed, modified, or corrected and speedy justice should not be done in that behalf.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 23rd day of October, 1893.

E. H. LACOMBE,
Judge of the Circuit Court of the United States
for the Southern District of New York.

RICHARD OLNEY,
Attorney-General of the United States,
Per EDWARD MITCHELL,
U. S. Attorney, Southern District of New York,
In behalf of the United States.

(Endorsed:) No. 1162. U. S. Supreme Court. The United States of America, appellant, vs. A. Klingenberg, importer, &c., appellee.
38 Citation. Richard Olney, Attorney-General, per Edward Mitchell, United States attorney, on behalf of the United States. Due service of a copy of the within is hereby admitted. New York, October 23, 1893, Curie, Smith & Mackie, attorneys for appellee. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

39 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to thirty-eight (38), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The United States of America, appellant, against A. Klingenberg, appellee, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York in the second circuit, this thirteenth day of November, in the year of our Lord one thousand eight hundred and nighty-three and of the Independence of the said United States the one hundred and eighteenth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsed on cover:) Case No. 15450. Term No. 1066. The United States, appellant, vs. A. Klingenberg. S. New York, C. C. U. S. Filed November 24, 1893. Supreme Court U. S., clerk's office. Received Nov. 22, 1893.

C

Office Supreme Court U. S.
FILED.
MAR 14 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
v.
A. KLINGENBERG.
} No. 1066.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
v.
A. KLINGENBERG.
No. 1066.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The question in this case is whether the action of a collector in estimating the value of foreign currency, for the purpose of reducing an importer's invoice into the money of the United States, is reviewable by the Board of General Appraisers and, on appeal from them, by the courts, under the customs administrative act of June 10, 1890, c. 407, 26 Stat., 131.

The appellee in July, 1892, imported certain merchandise into the United States from Austria-Hungary. The

invoice was made out in florins, in accordance with the provisions of section 2 of said customs administrative act, which requires "that all invoices of imported merchandise shall be made out in the currency of the place or country from whence the importations shall be made." In reducing the currency of the invoice into the money of the United States, the collector estimated the florin at $.482. The importer insists that it should have been estimated at 32 cents; and this is the only matter in dispute. There is no question as to the value of the merchandise, its proper classification, the rate of duty chargeable thereon, or as to any other subject, except the action of the collector in estimating the value of a florin.

The importer appealed from the decision of the collector to the Board of General Appraisers, who, after hearing testimony, decided that the collector should have estimated the florins of the invoice at 32 cents, and not at $.482 (Record, 7). Thereupon the United States commenced this proceeding in the circuit court of the United States for the southern district of New York, to review the decision of the Board of General Appraisers. The circuit court dismissed the petition for want of jurisdiction, upon the ground that the decision of the Board of General Appraisers complained of, since it related neither to classification nor to rate of duty, could not be reviewed by the courts under section 15 of the customs administrative act (Rec., 12), citing *Passavant* v. *United States*, 148 U. S., 214. The United States appeal to this court, and the circuit judge has certified the jurisdictional question under section 5 of the act of March 3, 1891 (c. 517), establishing the circuit courts of appeal. (Rec., 13.)

ARGUMENT.

I.

THE VALUE OF FOREIGN COINS IS FIXED BY THE DIRECTOR OF THE MINT AND PROCLAIMED QUARTERLY BY THE SECRETARY OF THE TREASURY; AND THE VALUATION SO PROCLAIMED IS ABSOLUTELY BINDING UPON ALL PERSONS AND ALL DEPARTMENTS OF THE GOVERNMENT, AND NOT SUBJECT TO CORRECTION OR REVIEW IN THE COURTS.

Section 2 of the customs administrative act of June 10, 1890, (c. 407, 26 Stat., 131), which is a substantial reproduction of Rev. Stat., sec. 2838, provides—

> That all invoices of imported merchandise shall be made out in the currency of the place or country from whence the importations shall be made, or if purchased in the currency actually paid therefor.

Section 52 of the Tariff Act of October 1, 1890 (c. 1244, 26 Stat., 567), which is a reproduction of Rev. Stat., sec. 3564, except that it provides for a quarterly instead of an annual proclamation, declares—

> That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; *and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint, and be proclaimed by the Secretary of the Treasury* immediately after the passage of this act and thereafter quarterly on the first day of January, April, July and October in each year.

Speaking of these statutory provisions, embodied at that time in the Revised Statutes, Mr. Justice Matthews in *Hadden* v. *Merritt*, 115 U. S., 25, 27, said:

> *The value of foreign coins, as ascertained by the estimate of the Director of the Mint and proclaimed by*

the Secretary of the Treasury, is conclusive upon custom-house officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding, to affect the rights of the government or individuals. There is no value, and can be none, in such coins, except as thus ascertained; and *the duty of ascertaining and declaring their value, cast upon the Treasury Department, is the performance of an executive function, requiring skill and the exercise of judgment and discretion which precludes judicial inquiry into the correctness of the decision. If any error, in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction; that is to appeal to the department itself.* To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority; and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute, as serves to limit the discretion of the Treasury Department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation. *The whole subject is confided by the law exclusively to the jurisdiction of the executive officers charged with the duty; and their action can not be otherwise questioned.*

When an invoice is not made out in standard foreign coin, but in a depreciated currency, it is governed by section 2903 of the Revised Statutes, which provides that—

> The President may cause to be established fit and proper regulations for estimating the duties on merchandise imported into the United States, in respect

> to which the original cost shall be exhibited in a depreciated currency, issued and circulated under authority of any foreign government.

Under this statute the President has prescribed regulations requiring the importer, when he claims his invoice to be in a depreciated currency, to establish the fact, and the amount of depreciation, by a consular certificate (Customs Regulations for 1892, article 296; Consular Regulations, article 664—both printed at pages 9 and 10 of this brief), and it has been held that no evidence except such consular certificate is receivable in support of a claim of depreciation. *Cramer* v. *Arthur*, 102 U. S., 612; *Rich* v. *Maxwell*, 3 Blatch, 127.

In *Cramer* v. *Arthur* (102 U. S., 612) the importer sought by evidence to establish a different value for the florin than that fixed by the proclamation of the Secretary of the Treasury and the consular certificate. Mr. Justice Bradley said (p. 619)—

> This we think the plaintiff can not be allowed to do. The proclamation of the Secretary and the certificate of the consul must be regarded as conclusive In the estimation of the value of foreign moneys for the purpose of assessing duties there must be an end to controversy somewhere. When Congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained. *If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these*

and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty. If existing regulations are found to be insufficient, if they lead to inaccurate results, the only remedy is to apply to the President, through the Treasury Department, to change the regulations.

II.

BUT SUPPOSE A COLLECTOR, IN REDUCING AN IMPORTER'S INVOICE INTO THE MONEY OF THE UNITED STATES, FAILS OR REFUSES TO ADOPT THE VALUATION OF THE FOREIGN CURRENCY WHICH THE SECRETARY OF THE TREASURY HAS PROCLAIMED, WHAT REMEDY, IF ANY, HAS THE GOVERNMENT OR THE IMPORTER?

In accordance with section 52 of the tariff act of 1890, the Secretary of the Treasury on July 1, 1892, issued a proclamation of the values of certain "coins in terms of the money of account of the United States, to be followed in estimating the value of all foreign merchandise exported to the United States on or after July 1, 1892, expressed in any such metallic currencies." (Treas. Synopsis, 13003.) The following is the portion of the proclamation relating to Austria-Hungary:

Country.	Standard.	Monetary unit.	Value in terms of U. S. gold dollar.	Coins.
Austria-Hungary.	Silver*..	Florin { Gold.. / Silver.	.48,2 } / .32 }	Gold: 4 florins, ($1.92,9); 8 florins, ($3.85,8); ducats, ($2.28,7); and 4 ducats, ($9.15,8).

*Silver the nominal standard; paper the actual standard, the depreciation of which is measured by the gold standard.

This was a declaration that both gold and silver florins were standard coins, but that silver was only a nominal standard, and that gold was the real standard with which paper, as a depreciated currency, was to be compared. As was said in *The Collector* v. *Richards*, 23 Wall., p. 259:

> In making the comparison of the moneys of different countries, their gold coins, if they have such, are employed for the purpose, gold having become the general medium of international exchange, whilst silver is regarded more as a domestic coin, and is usually made a legal tender for only limited amounts. This practice, together with the rejection of the alloy from the estimate, is in accordance with the rules laid down on the subject by the most enlightened economists.

And since there was no consular certificate with the appellee's invoice at bar, the collector was not at liberty to treat the paper florins of the invoice as a depreciated currency, but was bound to estimate them the same as gold florins.

The Secretary's proclamation was made even more definite by the following instruction issued to the collector of customs at New York, August 3, 1892 (Treas. Synopsis, No. 13091):

Value of florin of Austria.

> TREASURY DEPARTMENT, *August* 3, 1892.
>
> SIR: The Department is in receipt of your letter of the 26th ultimo, requesting specific instructions as to the treatment of certain invoices covering importations from Austria-Hungary.

You transmit entry No. 115,056, with accompanying invoice and bill of lading, covering an importation of ivory buttons of the total value as given in the invoice of 514 Austrian silver florins.

You state that the appraiser returned the entered (and invoice) value without addition, and that the question is as to the conversion of the currency into United States money.

You further state that in view of the footnote in the circular No. 101, of July 1, 1892, which declares "silver the nominal standard, paper the actual standard, the depreciation of which is measured by the gold standard," your office has taken upon entry the florin at $0.482 (the value of the gold florin as proclaimed in said circular), but is in doubt whether, in the presence of the certification by the consul that the value is in silver florins, such conversion may be maintained.

In reply I have to state that inasmuch as the silver florin of Austria is only a nominal standard, and that the actual standard is the gold florin, all florins, whether designated in invoices from Austria-Hungary as "Austrian florins," "silver florins," or "paper florins," when not accompanied with consular certificates of depreciation from the gold standard, must be taken as of equal value, viz, $0.482.

I return herewith the invoice and entry submitted with your letter, and inclose for your information a copy of a letter addressed this day to the Secretary of State in regard to certificates of depreciation of Austrian currencies.

Respectfully, yours,

L. CROUNSE,
Assistant Secretary.

(1201 g.)
COLLECTOR OF CUSTOMS,
New York.

The proclamation of the Secretary of July 1, 1892, as to when a paper florin was "depreciated," namely, when it was below par with a gold florin, and the decision of August 3, 1892, above quoted, are as binding as a proclamation of the President. In *Dutilh* v. *Maxwell* (2 Blatch., 541, 544), Betts, J., said:

> The acts of the Treasury Department, to which matters affecting the revenue properly belong, are, in law, the acts of the President (*Wilcox* v. *Johnson*, 13 Peters, 498), and, accordingly, the instructions given by the Secretary of the Treasury, either by general circulars to collectors or by specific directions in a particular case, are to be regarded by the court as regulations in that behalf established by the President.

The customs regulations for 1892 provide as follows (article 296):

> In the assessment of duty, the currency of the invoice must be reduced to the money of account of the United States upon the basis of the values of foreign coins, as proclaimed by the Secretary of the Treasury on the first days of January, April, July, and October of each year. The date of the consular certificate will indicate the value of invoice currency.
>
> When the standard value of foreign coin has not been thus proclaimed, any invoice expressed in such coin must be accompanied by a consular certificate showing its value in standard gold dollars of the United States.
>
> * * * * *
>
> *When invoices are made out in a paper currency which has become depreciated, the consul is instructed to certify the relative value of said currency as compared with the standard coin of the country of exportation,*

the latter being the only currency recognized by the law; and entries of such invoices must be reduced at the values so certified.

The Consular Regulations provide:

664. All invoices of merchandise exported to the United States must be made out in the currency of the place or country from whence the exportation is made, or, if purchased, in the currency actually paid therefor.

The *market value* of merchandise obtained otherwise than by purchase must be stated on the invoice in the standard coin of the country of exportation. The *price* of purchased merchandise must be stated on the invoice in the currency actually paid for it. *If that currency be depreciated, each copy of the invoice should be accompanied by a consular certificate (form No. 144) stating the percentage of depreciation of the currency actually paid as compared with the corresponding standard coin currency and the value in such standard coin currency of the total amount of the depreciated currency paid for the merchandise mentioned in the invoice.*

III.

THE CASE IS BEFORE THE COURT ON A MERE CERTIFICATE AS TO THE JURISDICTION OF THE CIRCUIT COURT; AND THE QUESTION THEREFORE IS NOT WHETHER THE COLLECTOR ERRED IN ESTIMATING THE PAPER FLORINS OF THE INVOICE AT $0.482, BUT SIMPLY WHETHER HIS DECISION WAS SUBJECT TO REVIEW BY THE BOARD OF GENERAL APPRAISERS AND BY THE CIRCUIT COURT.

I have thought it important, however, in considering whether his decision was reviewable, to show precisely what it was that the collector decided, and it turns out to be simply a question of the proper construction of the Secretary of the Treasury's proclamation of July 1, 1892;

whether, according to that proclamation, it was gold or silver that was declared to be the money standard of Austria-Hungary; whether paper florins were to be considered "depreciated" as compared with gold, or "appreciated" as compared with silver; whether that proclamation is susceptible of the remarkable construction put upon it by the board of appraisers, which makes *a paper currency above par.*

Surely it was never intended by Congress that a question of pure law such as this—a question of the construction of a public proclamation, a question affecting international finance—should be submitted without right of appeal to the final decision of a board of appraisers, appointed for their qualifications as experts in the valuation of merchandise. It may be that the action of a collector in reducing a foreign invoice into the money of the United States is not reviewable by the Board of General Appraisers under section 14 of the custom's administrative act of June 10, 1890; but if the collector's action is subject to review by the Board of General Appraisers, I insist that their decision is in turn reviewable, under section 15, by the circuit court, and that the court below erred in dismissing the proceeding for want of jurisdiction.

The appellee contends that every question which the collector may decide, including his valuation of foreign currency, is reviewable under section 14 of the customs administrative act of June 10, 1890, by the Board of General Appraisers, but that, under section 15, decisions of the Board of General Appraisers can not be reviewed by the courts unless they relate to "classification" or

"rate" of duty; in other words, that while the jurisdiction of the Board of General Appraisers, on review, is as broad as the original authority of the collector, the appellate jurisdiction of the courts over the Board is limited to questions of classification and rate of duty.

This view carried to its logical conclusion would exclude from appeal all questions as to the validity of protests, either on account of lapse of time or of insufficiency, for such questions do not involve strictly either "classification" or "rate," but only amount of duty.

Section 13 of the customs administrative act of June 10, 1890, relates solely to the appraisement of merchandise, and declares that the decision of the Board of General Appraisers "shall be final and *conclusive as to the dutiable value* of such merchandise * * * and the collector * * * shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable cost and charges thereon, according to law."

Section 14 declares "that the decision of the collector as to the rate and amount of duties * * * including all dutiable costs and charges, and as to all fees and exactions of whatever character, except duties on tonnage, shall be final and conclusive," unless the importer appeals to the Board of General Appraisers.

1. It may be claimed that the valuation of foreign currency relates neither to "rate" or "amount of duties," nor to "dutiable costs or charges," nor to "fees" or "exactions," within the meaning of this section; if so, the decision of the collector at bar was final, the appeal from him was without jurisdiction from the beginning, and the

circuit court would have been justified on that ground in dismissing the proceeding before it, and this court would be warranted in dismissing the present appeal.

According to this view, when a collector either willfully or by mistake estimates foreign currency higher than the rates proclaimed by the Secretary of the Treasury, the importer is remediless except by an application for a refunder to the Secretary of the Treasury under section 24. But the Government is equally remediless in case of an undervaluation of foreign currency by a collector, for in no event can the Government appeal under section 14 to the Board of General Appraisers. An appeal is allowed only to the importer.

2. But assuming that the importer may appeal to the Board of General Appraisers from the action of a collector in estimating the value of the foreign currency of the invoice, does an appeal lie in turn from the decision of the board to the courts, under section 15?

The circuit court decided this question in the negative, without an opinion, upon the authority of *Passavant* vs. *United States* (148 U. S., 214), but neither that case nor the case of *In re Fassett* (142 U. S., 479) justifies the conclusion of the circuit court. In *In re Fassett* it was held that the question whether an article is imported merchandise can not be reviewed under the customs administrative act of 1890; and in *Passavant* vs. *United States* the court held that the decision of the Board of General Appraisers, in valuing merchandise, is final, and not subject to review by the courts, in the absence of fraud. But the point now presented is whether the decision of the

Board of General Appraisers *on a question of pure law* is final, or whether under section 15 such a question, when it affects the amount of duties which the importer must pay, is subject to review by the court upon appeal from the Board of General Appraisers.

The appellee insists that under section 15 no appeal lies from the board of general appraisers except upon questions relating to "classification" or "rate" of duty. But that seems to be a strained construction, and one which leads to consequences that can not be held to have been within the contemplation of Congress. The language of section 15 is that—

> If the importer * * * or the collector * * * shall be dissatisfied with the decision of the board of general appraisers as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they, or either of them, may * * * apply to the circuit court * * * *for a review of the questions of law and fact involved in such decision.*

The section further provides for certifying up all the evidence taken before the appraisers, and for the taking of further testimony, which, together with a certified statement by the appraisers of the facts involved in the case and their decision thereon, the section declares—

> Shall constitute the record upon which the said circuit court shall give priority to and proceed *to hear and determine the questions of law and fact involved in such decision respecting the classification of*

such merchandise, the rate of duty imposed thereon under such classification, and the decision of such court shall be final, etc.

The language of the first part of the section, defining the right of appeal, is broader than that of the subsequent sentence last above quoted, and neither paragraph is wholly free from doubt. But it is submitted that the court is justified in construing the section to authorize the appeal at bar, which is upon a pure question of law affecting the amount of duty to be paid, and for the determination of which no other method seems to be provided.

A similar question would arise if, during the transit of goods, the Secretary of the Treasury, a quarter having expired, issued a proclamation changing the value of a foreign currency. Which valuation shall govern the liquidation; that in force at the date of exportation or that in force when the goods arrive in the United States? And if the collector decides that question of pure law, which relates neither to "rate" or "classification," either correctly or erroneously, is the Board of Appraisers made a court of appeal whose decision is final?

LAWRENCE MAXWELL, JR.,
Solicitor-General.

Supreme Court of the United States.

THE UNITED STATES,
Appellant,

vs.

A. KLINGENBERG.

No. 1066.

STATEMENT.

In July, 1892, the appellee imported from places in the Austro-Hungarian Empire certain glassware (Rec., fol. 21). The invoices were expressed in paper florins (fol. 22). The Collector converted the currency of the invoice into the money of account of the United States at the rate of $0.482, in assumed compliance with the proclamation of the Secretary of the Treasury of July 1st, 1892 (fol. 8). The importer protesting, claimed that, under a proper construction of the Secretary's proclamation, the florins should have been converted into dollars at the rate of $0.32 per florin (fols. 9, 22, 23). The adopting of the higher value for the florin necessarily increased the *amount* of *duties* to be paid by the appellee. The protest was transmitted to the Board of General Appraisers (fol. 8), who sustained it (fols. 15–17). There was no dispute as to the classification or rate of duty (Rec., fol. 24; Appellant's Brief, p. 2).

Nevertheless, the Collector filed what purported to be an appeal from said decision in the Circuit Court (fols. 1–4). A motion on behalf of appellee to dismiss

this appeal for want of jurisdiction (fol. 19) was granted on the authority of Passavant vs. United States (fol. 20). A decree dismissing it was entered (fols. 26, 27), and the jurisdictional question was certified to this Court (fols. 29, 30).

POINTS.

I.

The Circuit Court had no jurisdiction.

The proceedings to review the action of a Collector in assessing duties are purely statutory, and are governed by the so-called Customs Administrative Act of June 10th, 1890 (26 U. S. Stat. at Large, p. 131). The right of the Collector to invoke the jurisdiction of the Circuit Court to review a decision of the Board of General Appraisers is that which is conferred upon him in Section 15 of said act and no other. The language conferring the right is as follows:

"That if the owner, importer, consignee, or agent of any imported merchandise, or *the Collector*, or the Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in Section 14 of this act, *as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification*, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States, within the district in which the matter arises, for a review of the questions of law and fact involved in such decision."

It is not pretended that the Collector was dissatisfied with the decision of the board as to the classification

of the merchandise or the rate of duty chargeable upon it. In fact, the board had not as to either of these matters disturbed his (the Collector's) decision, nor had the importer asked them to. Where then does the Collector get any right of appeal? In the absence of a right to appeal, Section 14 of the act provides that "their [the board's] decision shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such who shall liquidate the entry accordingly." Unless the rights of the Collector, and the jurisdiction of the Circuit Court may be enlarged by interpolation in a plain and unambiguous provision of law, it is plain that the action of the Circuit Court in dismissing this appeal for want of jurisdiction was correct.

II.

The merits of the claim raised in the appellee's protest are not before this Court for review.

This disposes of pages 3 to 10 of the Solicitor-General's brief. But the following remarks may be made in passing:

(a) Nobody claims that the decision of the Director of the Mint proclaimed by the Secretary of the Treasury as to the value of foreign coins can be reviewed by either the Board of General Appraisers or the Courts. The claim of the appellee was that the Collector did not correctly apply and follow the proclamation of the Secretary as it was his duty by law to do.

(b) Nobody claims that there can be an allowance

for depreciation of paper currency without a consular certificate of depreciation. The importer claims, and the board decided, that the currency of these invoices was not a depreciated currency.

(c) The proclamation of the Secretary, which is binding on the Collecter and importer, is the one issued by the Secretary at the beginning of the quarter as required by Section 52 of the Tariff Act of 1890 (26 U. S. Stat. at Large, p. 567). Subsequently expressed opinions of the Secretary on the subject, such as the letter of August 3d, cited on page 8 of the Solicitor-General's brief, have not the force of law.

(d) The statute (Section 52 above cited) authorizes the Secretary to proclaim the value of foreign coins *in circulation*. When he assumed to proclaim the value of a gold florin he was proclaiming the value of something which it appears by the last column of his proclamation (see S. S. 13,003 only partially quoted in appellant's brief) was not only not in circulation but had no existence.

(e) The Solicitor-General considers the decision of the Board of General Appraisers, that a paper currency was sometimes above par, " remarkable " (although a premium was being paid for paper currency in large cities of this country only last summer), but does not seem to consider it " remarkable " that the Minister of Finance of a great nation should deliberately state that paper was the actual standard of value in Austria-Hungary.

III.

The importer had an indisputable right to have the Collector's action reviewed by the Board of General Appraisers.

It seems strange that this should be questioned, but it seems to be on pages 12 and 13 of the Solicitor-General's brief.

The statute (Section 14 of the Customs Administrative Act) provides for a review by the Board of General Appraisers of the decision of the Collector as to "the rate and *amount of duties* chargeable upon imported merchandise, including all dutiable costs and charges, and as to *all* fees and *exactions of whatever character* (except duties on tonnage)."

The taking of a $0.482 instead of a $0.32 valuation for the Austrian florin certainly increased the amount of duties, and was an exaction which was not a duty on tonnage. How then can it be contended that the Collector's decision was not reviewable? The Collector made no such claim, for he sent the protest to the board for decision, and then appealed from their decision. No such claim has ever been hinted at before by anybody, though this act has been in operation over three years and a half. It seems strange that at this date a contention should be raised for the first time that any of the hundred or more collectors in the country can make a decision as to the duty which a merchant shall pay, and the latter have no legal redress, or any redress except an appeal to the Secretary of the Treasury. And what if the illegal act of the Collector was done by direction of the Secretary, as a majority of them are? It would require very plain and unmistakable language to induce any court to hold this, and no reason whatever is assigned for asking them to do so in this case, except a suggestion that "it may be claimed."

IV.

No mischievous or unreasonable result would attend the strict construction of Section 15.

The Solicitor-General says (p. 12 of his brief):

"This view carried to its logical conclusion would exclude from appeal all questions as to the validity of protests, either on account of lapse of time or of insufficiency, for such questions do not involve strictly either 'classification' or 'rate,' but only amount of duty."

This is a misconception. If the protest is as to the classification or rate of duty, and either party is dissatisfied with a decision of the board as to its timeliness or sufficiency, he must be dissatisfied with its decision as to the rate of duty, as the board must either decide that the Collector is entitled to retain the money exacted by him at the rate of duty assessed, or that he must reliquidate the entry at a lower rate. If, on the other hand, the protest does not relate to the classification or rate of duty, then the decision of the board would not be reviewable on the merits, neither is it reviewable as to the timeliness or sufficiency of the protest.

On page 15 of his brief the Solicitor-General scouts the idea of the Board of Appraisers being made a final tribunal on questions of law.

So much of the law as does not relate to the classification or rate of duty on imported articles is law of administration, and as to this it is not at all remarkable that Congress should have made the decisions of the board final. Of course it was to be supposed that the persons to be appointed to these positions would be men of standing and of some knowledge of the law theoretical or practical, or both, and as matter of fact, I believe that of the present board four members are

lawyers, one of whom was, just prior to his appointment, a United States Attorney, and another a Judge of the Supreme Court of Alabama. There is nothing startling in the proposition that a board so composed should make final decisions as to questions of law relating to administration, leaving to the Courts the more difficult and complicated questions of rates of duty.

The appraisement of values often involves the determination of delicate and intricate questions of law, yet upon this branch of customs administration the decision of the Board of General Appraisers has been made final, and there was no reason why Congress should not have given them equal power and responsibility on all questions of administration connected with the revenue laws.

But whatever may be said about the wisdom of the action of Congress, that is not open to discussion where the language of the law is plain. If it is claimed by the Treasury Department or the Department of Justice that a dangerous power has been placed in the hands of the Board of General Appraisers, these are proper considerations or suggestions to be called to the attention of the law-making body, which is even now framing new legislation on this subject. They have no place in this discussion as to the meaning and effect of a plain and unambiguous provision of law.

V.

This Court has twice construed the language now before the Court as it was construed by the Court below.

In the case of *In re* Fassett, 142 U. S., 479, at page 487, this Court said:

"The appeal provided for in Section 15 brings up for review in Court only the decision of the Board of General Appraisers *as to the construction of the law, and the facts respecting the classification of imported merchandise, and the rate of duty imposed thereon under such classification.*"

In Passavant vs. United States, 148 U. S., 214, at pp. 218, 219, this Court said:

"It is provided by Section 15 of the act 'that if the owner, importer, consignee or agent of any imported merchandise, or the Collector or the Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in Section 14 of this act, *as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification*, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the district in which the matter arises for a review of the questions of law and fact involved in such decision.'

"The appeal to the Court in the present case seeks to review no such decisions as are thus enumerated as falling within its jurisdiction under such sections.

"It was certainly competent for Congress to create this Board of General Appraisers."

In the case first mentioned the Court was dealing with the question whether a vessel was imported merchandise, and in the second case with a question of valuation of merchandise. While the precise question

involved in this case is different, the principle involved is precisely the same, and the Court below was not only justified in holding itself bound by the decision in the Passavant case, but could have reached no other conclusion.

VI.

The jurisdictional question certified to this Court should be answered in the negative, and the decision affirmed.

New York, March 20th, 1894.

W. WICKHAM SMITH,
Counsel for Appellee.